

1 **THE COUNTRY LAWYER, P.C.**

2 741 East Fry Boulevard
3 Sierra Vista, Arizona 85635
4 (520) 459-6400

5 FAX: (520)459-2540

6 Perry@thecountrylawyer.com

7 Perry Hicks

8 Attorney for Defendant

9 State Bar No. 007695

FILED

2018 MAR -9 PM 4:48

MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT

BY [Signature]
SV

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

11 IN AND FOR THE COUNTY OF COCHISE

CR 2018 00019

12 STATE OF ARIZONA,)

NO. CR20800019

13 Plaintiff,)

**RULE 12.9 MOTION TO REMAND AND
ALTERNATIVE MOTION TO DISMISS**

14 vs.)

[Oral Argument Requested]

15 BRIAN POWERS,)

16 Defendant.)

17 COMES NOW the defendant, **BRIAN POWERS**, by and through his attorney, Perry Hicks,
18 and, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
19 Constitution, and Article II, §§ 1, 2, 4, 13, 23, 24, 32, & 33 of the Arizona Constitution and Rule
20 12.9 Arizona Rules of Criminal Procedure, moves this court to remand this case to the Grand Jury
21 for a new determination of probable cause or, in the alternative, for dismissal of all charges.

22 This motion is based upon the attached Memorandum of Points and Authorities and
23 documents.

24 RESPECTFULLY SUBMITTED this 9 day of March, 2018.

25 **THE COUNTRY LAWYER, P.C.**

26 By: [Signature]

Perry Hicks
Attorney for Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MEMORANDUM OF POINTS AND AUTHORITIES

A. INTRODUCTION

This case arises from the robbery of a Subway restaurant in Sierra Vista which was alleged to have taken place on December 18, 2017 and the attempted robbery of the Sierra Vista Little Ceasar's pizza shop alleged to have occurred on December 23, 2017. The investigating officers were Detective Dannels, who was the sole witness who testified before the Grand Jury, and Detective Stewart, both from the Sierra Vista Police Department.

The Grand Jury returned a true bill on the eleven-count proposed indictment provided to them. Mr. Powers seeks an Order of this Court remanding this matter to the Grand Jury for a new finding of probable cause or, alternatively, for dismissal of the current indictment.

B. FACTS AND ISSUES PRESENTED

***References to the Grand Jury transcript are enclosed within (parenthesis.) References to Exhibits, such as portions of the police reports, are enclosed within [brackets.]**

The facts and issues presented before this Court, in support of Mr. Powers' motion, are as follows:

1. Before taking testimony, counsel for the State identified several potential witnesses and inquired of the Grand Jurors as to whether or not they knew of said witnesses (GJT p. 4). But, the prosecutor failed to so identify or inquire of the Grand Jury as to others, to wit; HSI Theresa Armstrong, "Molly" Manley (Alleged Subway victim), John Stevens (Alleged Little Ceasar's victim), Erich Nahooopi (a defense alibi witness and fact witness who had information adverse to the State's case), or alibi witness Jacob Jablonski.

2. The prosecutor failed to inquire of Detective Daniels as to whether or not non-law enforcement witnesses would be available to testify at trial.

3. The prosecutor failed to advise the Grand Jury of Mr. Powers' claim of alibi or that it was supported by witnesses who were not identified to the Grand Jury as potential witnesses, but whose identities were known to the State. Although Detective Dannels testified that Mr. Powers first said that he was at his grandparents in Elgin (GJT, p.23), no such statement appears in the police reports disclosed by the State. On the other hand, however, Mr. Powers

1 stated to Detective Dannels that on the night and about the time of the alleged Little Cesar's
2 incident, he was at home and then met his cousin at JR's Bar in Sierra Vista. His cousin, Jacob
3 Jablonski, verified that he met Mr. Powers at JR's on 12/23/17 and that they stayed there until
4 0200 on 12/24/17.

5 4. As to the Subway incident, Detective Dannels testified that he viewed a video of
6 the incident and that the video showed that the perpetrator held what looked like a "pencil" in his
7 right hand. (GJT, p. 9, L. 21). Thereafter, however, and by way of leading questions, the
8 prosecutor had Detective Dannels testify that his viewing of the video allowed him to "see a
9 pistol." (GJT, p. 10, L. 9). The leading questioning prevailed through the next several pages
of the transcript. (GJT, p. 11, *et seq.*)

10 5. The one Subway witness who saw the perpetrator's fully masked face, John
11 Stevens, was shown a photo lineup by detectives. He identified a juvenile, Timothy Jongeward,
12 as the Subway perpetrator. [Police report, p. 295]. Later, Mr. Maryland, the Little Cesar's
13 victim, was shown a separate photo-lineup, including Jongeward and Mr. Powers, and he failed
14 to positively identify Mr. Powers. The State failed to inform the Grand Jury that a person known
15 to Mr. Powers, but not identified to the Grand Jury, one Erich Nahoopi, reviewed the video of
16 the Subway incident and, despite being well familiar with Mr. Powers, he could not identify him
17 as the perpetrator in that crime. [182.] Mr. Nahoopi also told police that Mr. Powers stopped to
see him on the way to JR's (or Paul's Pub), where Mr. Powers said he was going on December
23, 2017. [182].

18 C. LAW AND DISCUSSION

19 A defendant charged by indictment and who wishes to challenge that indictment, may do
20 so only do so by way of a motion for a new finding of probable cause which alleges that he was
21 denied a substantial procedural right. Ariz. R. Crim. P., Rule 12.9. In this case, Mr. Powers
22 alleges several separate grounds supporting his motion to remand. This Court is asked to
23 consider each ground separately, and in the aggregate, and remand this matter for a new finding
of probable cause.

24 **1. THE PROSECUTOR FAILED TO IDENTIFY TO AND MAKE A** 25 **PROPER INQUIRY OF THE GRAND JURY AS TO WHETHER ANY OF** 26 **THEM KNEW SEVERAL OF THE WITNESSES WHO ALLEGEDLY LINKED** **MR. POWERS TO THE CRIMES CHARGED.**

1 Before presentation of this case to the Grand Jury, the prosecutor represented to the
2 Grand Jury the names of people who may be mentioned in this case, and asked them if they
3 knew any of them. When he did so, he failed to mention several key witnesses, including alibi
4 witnesses, relating to the alleged offenses.

5 While counsel for the State identified several potential witnesses, and inquired of the
6 Grand Jurors as to whether or not they knew of said witnesses (GJT p. 4), he failed to so
7 inquire of the Grand Jury as to others, to wit; Theresa Armstrong (an HSI agent), "Molly"
8 Manley (an alleged Subway incident victim), John Stevens (an alleged Little Ceasar's victim),
9 Erich Nahoopi (defense alibi witness and fact witness who had information adverse to the State's
10 case), or Jacob Jablonski (an alibi witness).

11 The Grand Jurors did not register whether they knew these people or not, or whether it
12 would affect their deliberations, since they were not told of their existence prior to the
13 presentation of testimony.

14 "Statutes and rules secure an unbiased grand jury largely without defendant's or
15 his attorney's participation. The court examines, or voir dieres, the grand jurors to
16 determine [***6] that each juror is a qualified elector of the county and can sit
17 impartially. See Ariz.R.Crim.P. 12.1, (b), 17 A.R.S. In addition, the jurors are
18 informed of their duty to disqualify themselves from sitting on a particular matter
19 in which they have a conflict of interest. See, Ariz.R.Crim.P. 12.1(d)(3), 17
20 A.R.S. Generally*** the jurors are reminded of this duty after identification of
21 the parties in the matter under consideration."

22 *State of Arizona v. Hastings*, 162 Ariz. 117, 781 P.2d 590 (1989).

23 Moreover, there was never any testimony that the identified or unidentified witnesses
24 would be available to testify at trial of the matter.

25 Detective Dannels did not testify as to any direct evidence that Mr. Powers was present
26 at or perpetrated either of the alleged victimized locations, Little Ceasar's and Subway. The
testimony was predominantly offered as hearsay from witnesses, disclosed and non-disclosed.

While it has been long accepted that presentation of hearsay evidence to a Grand Jury
does not itself invalidate an indictment, *see, Chadwick v. Costello v. United States*, 350 U.S.
359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), it has not been decided whether, in the absence of
substantial evidence, whether an indictment based on hearsay alone violates a substantial right

1 of the Defendant. Indeed, implicit in the relevant decisions is the conclusion that if other,
2 substantial evidence exists, then that the Grand Jury considered hearsay will not invalidate an
3 indictment. On the other hand it has been said that, "If a grand jury consider [sic] competent
4 and incompetent evidence, they can still indict *if the competent evidence is sufficient to convince*
5 *them there is probable cause....*" See, *United States v. Smyth*, 104 F. Supp. 283, 300 (ND Cal.,
1952). [emphasis supplied]. See, also, *Chadwick v. United States*, 141 F. 225 (6th Cir., 1905).

6 This leaves us, of course, with the unanswered question of, "Does a defendant
7 have a substantial due process right to be indicted on hearsay evidence alone only if
8 there is little other substantial evidence presented to convince the Grand Jury that
9 there is probable cause?" Mr. Powers submits that such a right exists. One need only
10 look to Ariz. R. Crim. P. Rule 5.4 which governs the reliance of hearsay evidence in
the preliminary hearing setting.

11 Rule 5.4 of the Arizona Rules of Criminal Procedure states, in pertinent part:
12 "Determination of probable cause***c. Evidence. The finding of probable cause
13 shall be based on substantial evidence, which may be hearsay in whole or in part
in the following forms:

14 (1) Written reports of expert witnesses;

15 (2) Documentary evidence without foundation, provided there is a
16 substantial basis for believing such foundation will be available at trial and the
document is otherwise admissible;

17 (3) *The testimony of a witness concerning the declarations of another*
18 *or others where such evidence is cumulative or there is reasonable ground to*
19 *believe that the declarants will be personally available for trial.***"*
Id. [emphasis supplied].

20 In this case, the hearsay attributed to the alleged victims and the HSI agents not
21 only was not cumulative, it was the only evidence presented which possibly linked Mr.
22 Powers to the alleged crime. There was no proof whatsoever offered that Mr. Powers had
23 masks, a gun, or a bandana matching the ones claimed to have been possessed by the
24 perpetrator. There was no substantive evidence that Mr. Powers was, himself, at the
25 locations victimized at the time of the incidents. Only the hearsay attributed to the
26 alleged victims and the HSI agent, who did an analysis of cell phone locations, provide
any link between the offenses and Mr. Powers, however tenuous.

1 It cannot fairly be said that the alleged such hearsay statements constitute
2 substantial evidence. It stands to reason that if hearsay constitutes substantial evidence in
3 a preliminary hearing only if it is cumulative or "...there is reasonable ground to believe
4 that the declarant will be personally available for trial..." then the term "substantial
5 evidence" must have the same meaning in the context of a grand jury examination.

6 There was no testimony before the grand jury that the witnesses identified by the
7 prosecutor, or those not identified, would be personally available at trial and there existed
8 no reasonable ground for the grand jury to have believed that they would be. Absent such
9 testimony, the hearsay declarations offered by the officer to the grand jury cannot be
10 deemed relied upon to support the indictment.

11 It is clear that Mr. Powers had a procedural right to have the grand jury determine
12 probable cause based upon hearsay only if the hearsay declarations were offered together
13 with substantial evidence that he committed the crime. Mr. Powers submits that he had a
14 substantial due process right to be indicted on hearsay evidence alone only if there was
15 other substantial evidence presented to convince the Grand Jury that there is probable
16 cause. There was not, and pursuant to Rule 12 a remand to the grand jury for a new
17 finding of probable cause is required to redress the violation of Mr. Powers' due process
18 rights.

19 It is beyond argument that Mr. Powers had the due process right to an unbiased
20 Grand Jury. The Court is asked to take judicial notice that said right generally is
21 protected by full disclosure to the Grand Jury of the participants in the case, followed by
22 an inquiry as to whether or not those participants are known to the jurors. If a
23 relationship with or knowledge of the participant with the juror is established, then
24 further inquiry into whether the relationship or knowledge of a participant would
25 influence the juror. Here, and because the prosecutor failed to ask the Grand Jurors
26 about their relationship with several key persons involved in the investigation, there is no
way for the Defendant to establish whether or not any of his Grand Jurors knew the
participants, or whether such knowledge would affect their deliberations.

 Because he cannot interview the Grand Jurors on the issue, there is but one

1 possible way to ensure that his rights are protected; that is to remand this matter for a new
2 finding of probable cause.

3 **2. THE PROSECUTOR FAILED TO PROPERLY ADVISE THE**
4 **GRAND JURY OF MR. POWERS' CLAIM OF ALIBI OR THAT IT**
5 **WAS SUPPORTED BY WITNESSES WHO WERE NOT IDENTIFIED BY**
6 **THE PROSECUTOR.**

6 In this case, the prosecutor failed to advise the Grand Jury of Mr. Powers' claim of
7 alibi or that it was supported by witnesses, who were not identified to the Grand Jury as
8 potential witnesses, but whose identities was known to the State. Although Detective
9 Dannels testified that Mr. Powers first said that he was at his grandparents in Elgin (GJT,
10 p.23), no such statement appears in the police reports disclosed by the State.

10 On the other hand, however, Mr. Powers did state to Detective Dannels that on the
11 night and about the time of the alleged Little Cesar's incident, he was at home and then
12 met his cousin at JR's Bar in Sierra Vista. His cousin, Jacob Jablonski, verified that he
13 met Mr. Powers at JR's on 12/23/17 at about the time of the alleged crime and that they
14 stayed there until about 0200 on 12/24/17. Mr. Powers' friend, Mr. Nahoopi, another
15 witness not identified by the prosecutor, also told police that Mr. Powers stopped to see
16 him on the way to JR's (or Paul's Pub), where Mr. Powers said he was going on December
17 23, 2017 to meet his cousin.

17 While under current law "alibi" is not an affirmative defense, *see*, A.R.S. §13-103,
18 certainly where, as here, a potential defendant's presence at the location of alleged criminal
19 act at the times the crime was alleged to have occurred are central to a finding of probable
20 cause.

20 Simple fairness dictates that evidence or testimony that a subject of the Grand Jury
21 consideration was not where the crime was allegedly committed at the time it was
22 committed should be presented to them. The Second Circuit has indicated that "where a
23 prosecutor is aware of any substantial evidence negating guilt he should, in the interests of
24 justice, make it known to the grand jury, at least where it might reasonably be expected to
25 lead the jury not to indict. "*See, United States v. Ciambone*, 601 F/2d 616, 623 (2nd Cir.
26 1979).

1
2 3. Testifying before the Grand Jury regarding the Subway incident,
3 Detective Dannels testified that he viewed a video of the incident and that the
4 video showed that the perpetrator held what looked like a "pencil" in his right
5 hand. (GJT, p. 9, L. 21). Thereafter, however, and by way of leading questions,
6 the prosecutor had Detective Dannels change that testimony to reflect that his
7 viewing of the video allowed him to "see a pistol." (GJT, p. 10, L. 9). The leading
8 questioning prevailed through the next several pages of the transcript. (GJT, p.
9 11, *et seq.*)

10 The nature of the Grand Jury process and the prosecutor's role are discussed at
11 length in *Maretick v. Jarrett*, 204 Ariz. 1947, 62 P.3d 120 (2003). That Court stated;

12 "The Supreme Court has described the grand jury as "a primary security to the
13 innocent against hasty, malicious and oppressive persecution; it serves the
14 invaluable function in our society of standing between the accuser and the
15 accused...to determine whether a charge is founded upon reason or was dictated by
16 an intimidating power or by malice or ill will. "*Wood v. Georgia*, 370 U.S. 375,
17 390, 82 S. Ct. 1364, 8 L.Ed.2d 569 (1962). The grand jury's mission is "to bring to
18 trial those who may be guilty and clear the innocent." *Marston's Inc. V. Strand*,
19 114 Ariz. 260, 264, 560 P.2d 778, 782 (1977). To do its job effectively, the grand
20 jury must receive a fair and impartial presentation of the evidence. *Crimmins*, 137
21 Ariz. At 41, 668 P.2d at 884; *State V. Emery*, 131 Ariz. 493, 506, 642 P.2d 838,
22 851 (1982). Because defendants enjoy few procedural rights before the grand jury,
23 grand juries must be unbiased and independent and must act "independently of
24 either prosecutor or judge." *Marston's*, 114 Ariz. At 264, 560 P.2d at 782.

25 Grand jurors have a right to hear all relevant, non-protected evidence that bears on
26 this case. See *id.* Thus if the grand jurors have reasonable ground to believe that
other available evidence "will explain away the contemplated charge, they may
require the evidence to be produced." Ariz.Rev.State §21-412 (2002); see also
Crimmins, 137 Ariz. At 44, 668 P.2d at 887 (Feldman, J., specially concurring).

20 II. THE PROSECUTOR'S ROLE

21 The prosecutor's role before the grand jury is unique in our system. The prosecutor
22 acts not simply as an advocate, but as a "minister of justice." who assists the jurors
23 in their inquiry. See Ariz. R. Sup.Ct. 42, ER 3.8 cmt. Prosecutors bear a
24 "particularly weighty duty not to influence the jury because the defendant has no
25 representative to watch out for his interests" before the grand jury. *State v. Hocker*,
26 113 Ariz. 450, 454, 556 P.2d 784, 788 (1976), *disapproved on other grounds*, *State*
v. Jarzab, 123 Ariz. 308, 311, 599 P.2d 761, 764 (1979). The prosecutor therefore
"must not take advantage of his or her role as the *ex parte* representative of the
state before the grand jury to unduly or unfairly influence it." 1 ABA *Standards for*
Criminal Justice, Ch. 3, Std. 3-3.5 cmt. (2d ed. 1980). Indeed, the prosecutor must

1 "give due deference to [the grand jury's] status as an independent legal body." *Id.*
2 Significantly, the initiation and control of questioning "rests with the grand jury
3 and not the prosecutor." *Gershon v. Broomfield*, 131 Ariz. 507, 509, 642 P.2d 852,
4 854 (1982), *quoted in Crimmins*, 137 Ariz. At 44, 668 P.2d at 887 (Feldman, J.,
5 specially concurring). In other words, the prosecutor's powers "are derived from
6 the grand jury; it is the grand jury that possesses the broad investigative powers,
7 and...must be the decision maker." *Id.*

8
9 In this case, where aggravated assault, attempted armed robbery and armed robbery
10 were alleged, the issue of whether or not the perpetrator of the offenses was armed with
11 a gun is information crucial to a determination of probable cause.

12
13 Detective Dannels initially testified that while viewing the video of the Subway
14 incident, the alleged perpetrator appeared to be holding a "pencil" in his right hand.
15 Thereafter, through leading questions, the prosecutor took control of the testimony. The
16 prosecutor led the witness to change his testimony from the conclusion that the perpetrator
17 held what looked like a "pencil," to a conclusion that the video showed the perpetrator
18 holding a "pistol."

19
20 Clearly, and set forth in *Maetrick*, in this case the prosecutor acted as an advocate.
21 The prosecutor, by leading the witness through his testimony, apparently ignored that
22 "particularly weighty duty" not to influence the jury where, as here, Mr. Powers had no
23 representative to watch out for his interests before the grand jury. Stated differently, the
24 prosecutor here took advantage of his role as the *ex parte* representative of the state
25 before the grand jury and used leading questions to unduly or unfairly influence it.

26 This Court should remand this matter for a new determination or probable cause
or, alternatively dismiss the indictment.

4. **The prosecutor failed to provide the Grand Jury with important
exculpatory information to the Grand Jury, in violation of his duty to be a
"minister of justice."**

The role and responsibility of a prosecutor presenting a case to a grand jury is clearly set
forth above. In this case, the prosecutor did not present important, exculpatory information to
the grand jury.

In addition to the alibi information described above, the one Subway witness who saw

1 the perpetrator's fully-masked face, John Stevens, was initially shown a photo lineup by
2 detectives. He positively identified a juvenile, Timothy Jongeward, as the Subway perpetrator.
3 [Police report, p. 295]. He never identified Mr. Powers as the perpetrator. Mr. Maryland, the
4 alleged Little Ceasars' victim, was shown a separate photo-lineup, including Jongeward and Mr.
5 Powers, and he failed to 100% identify Mr. Powers, since the perpetrator wore a bandana as a
6 mask. The Detective apparently failed to show the second photo-lineup to the Subway witness
7 and interrupted a Grand Juror's question inquiring if the witness was shown the "current" copy.
(GJT p., L.8).

8 So, the Subway victim never did identify Mr. Powers, but did identify Timothy
9 Jongeward. The Little Ceasars' victim couldn't positively identify Mr. Powers. Neither
apparently knew Mr. Powers.

10 Significantly, and in the absence of a positive victim identification of Mr. Powers as the
11 perpetrator of the alleged crimes, Mr. Powers submits that because of the importance of the
12 identification issue, the prosecutor had an affirmative duty to submit to the Grand Jury the fact
13 that an acquaintance of Mr. Powers, one Erich Nahoopi, was asked to and did review the video
14 of the Subway incident and was asked if he could identify the alleged perpetrator, but he did not
15 recognize his friend, Mr. Powers, in the surveillance footage. [182.] This fact was not presented
16 to the Grand Jury and certainly would, if revealed, loom largely in the determination of probable
cause.

17 Accordingly, Mr. Powers submits that in the context of this case the prosecutor's failure
18 to reveal the important fact of non-identification by Mr. Nahoopi constituted a further violation
19 of the State's duty of fairness.

20 **D. CONCLUSION**

21 The manner in which this matter was presented to the Grand Jury significantly violated
22 Mr. Powers' right to procedural due process and, pursuant to Rule 12.9 of the Arizona Rules of
23 Criminal procedure, he is entitled to dismissal or, alternatively, a remand to the grand jury for
24 a new finding of probable cause.
25
26

1 RESPECTFULLY SUBMITTED this 9 day of March, 2018.

2
3 THE COUNTRY LAWYER, P.C.

4
5
6 By: Perry Hicks
7 Perry Hicks
8 Attorney for Defendant
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26